No. [illegible]

In the Supreme Court of the United States

October Term, 1954

[illegible]

v.

[illegible]

On [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 999

H. H. SPETEN, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its findings of fact and conclusions of law appear in the Record (R. 15–18). The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 31–35) is reported in 146 F. 2d 602.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on January 17, 1945. The petition for a writ of certiorari was filed in this Court on February 28, 1945. Juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the statutory right of action for damages for a price overcharge which Section 205 (e) of the Emergency Price Control Act as amended vests respectively (1) "in the person who buys * * * for use or consumption other than in the course of trade or business", and, (2) in the Price Administrator when "the buyer * * * is not entitled for any reason to bring the action", belongs to the Administrator in the case of an over-ceiling sale to a farmer of a combine for use in harvesting his grain and for general farming use.

2. Whether the provision authorizing the Administrator to recover damages constitutes a taking of property without just compensation prohibited by the Fifth Amendment.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App., Supp. III, Sec. 901), as amended by the Stabilization Extension Act of 1944 (Act of June 30, 1944, 58 Stat. 640, 50 U. S. C. A. App. Sec. 925), and Maximum Price Regulation No. 133, as amended, 7 F. R. 3185 and 8 F. R. 234, 2286. The pertinent provisions of the Act and

the Regulation are set forth in the Appendix, *infra*.

STATEMENT

The Administrator instituted this action in the District Court for the District of North Dakota pursuant to Section 205 (e) of the Act to recover statutory damages from the petitioner for selling two combines to farmers on July 27, 1943, at prices over the ceiling.[1] The facts were stipulated (R. 10–14), and the findings of fact (R. 16–17) are unchallenged.

The facts, in so far as they are pertinent to the issues now raised, are merely that the petitioner sold the combines at prices higher than those permitted under the regulations, and that the purchasers were farmers who obtained the combines in order to use them in the course of their farming operations.

Petitioner's defenses were (1) that under Section 205 (e) of the Emergency Price Control Act the right of action for damages was vested in the farmer-purchasers and not in the Administrator, on the ground that the purchases by the farmers were "for use and consumption other than in the course of trade or business"; and (2) that the vesting of the right of action for damages in the Administrator and not "for the benefit of the

[1] The Administrator also sought and obtained an injunction pursuant to Section 205 (a) of the Act (R. 4, 7, 18, 33–34). Petitioner raises no question here which relates to the propriety of the injunction.

'injured parties'" was unconstitutional (R. 9–10).

The district court, overruling these contentions, granted the Government's motion for summary judgment, and awarded the Administrator damages totalling three times the aggregate of the overcharges (R. 18–19). The conclusions of the district court were approved by the circuit court of appeals (R. 31–33), but the case was remanded in order to permit the petitioner to take advantage of an intervening amendment to the Act,[2] which provided that if the defendant proved that a violation was not wilful nor the result of failure to take practicable precautions, the recovery should be in the amount of the overcharges or $25, whichever was the greater, instead of treble damages (R. 34–35).

ARGUMENT

1. The rulings below that the statute gives the right of action to the Administrator and not to the farmer purchasers are plainly correct.

It is contended that the term "use or consumption other than in the course of trade or business" (Section 205 (e)) means use or consumption by an ultimate user or consumer even though in the course of trade or business, so long as there is no resale; and, accordingly, that the Administrator

[2] Added by Section 108 (b) of the Stabilization Extension Act of 1944 (Act of June 30, 1944, 50 U. S. C. A. App. Sec. 925), *infra*, p. 11.

has the right of action only when the purchase is for resale. But obviously "in the course of trade or business" has a much broader meaning than "for resale", and the court below, together with the other appellate courts to which the issue has been presented, rightly so held. See *Bowles* v. *Seminole Rock and Sand Co.*, 145 F. 2d 482 (C. C. A. 5), certiorari granted on another issue, March 12, 1945, No. 914, this Term; *Lightbody* v. *Russell*, 293 N. Y. 492, 58 N. E. 2d 508. Cf. *Bowles* v. *Glick Brothers Lumber Co.*, 146 F. 2d 566 (C. C. A 9).[3]

Section 205 (e) looks to two broad classes of purchasers: (1) those who buy for *personal* consumption other than in the course of trade or business, e. g., the housewife buying at the local store; and (2) those who buy for use or consumption in the course of their trade or business. The first class is given a right of action for overcharges. But those in the second class may be able to include the amount they are overcharged in the price of their own product, so that they might receive a windfall if permitted also to recover damages from the seller. In order that those who sell to such purchasers should not escape civil liability, the statute granted the *Administrator* the civil right of action against them.

[3] A decision to the contrary in *Bowles* v. *Rogers*, 57 F. Supp. 987 (N. D. Ind. 1944) is pending on appeal to the Circuit Court of Appeals for the Seventh Circuit.

In addition, Section 205 (e) carries forward the parallel distinction contained in Section 4 of the Act, which in establishing the statutory prohibitions does not reach the non-commercial buyer, but which makes the buyer in the course of trade or business subject to the statutory prohibitions to the same extent as the seller (Appendix, *infra*, p. 10). Congress had been advised that (Hearings before the Senate Banking Committee on the Price Control Bill, H. R. 5990, 77th Cong., 1st sess. (1941), p. 141 (testimony of David Ginsburg, General Counsel of OPACS and OPA)):

> * * * a lot of pressure on sellers comes from the buyers themselves. This does not apply to the ordinary purchaser of household goods for immediate consumption; it only applies to persons who buy in the course of trade or business, so that the price regulation is made applicable both to the seller and to the buyer, and only to those buyers who buy for business purposes in business transactions.

It would not have been feasible to grant the civil remedy to a class of buyers who might themselves be chargeable with violating the statute with respect to the same transaction. Accordingly the Price Administrator was given the right to institute suit for statutory damages in all cases of "industrial buyers" (*id.*, at p. 216),[4] and the only purchasers who were empowered to sue in their own right for overcharges were "non-

[4] Cf. *Bowles* v. *Glick Brothers Lumber Co.*, *supra*.

commercial consumers" (Conference Report on the Price Control Bill, H. Rep. No. 1658, 77th Cong., 2d sess. (1942), p. 26), "the housewife, in effect" (Senate Hearings, *op. cit.*, at p. 141). The contention that Section 205 (e) draws a distinction between persons in "trade or business" who purchase for resale, and those who are "ultimate consumers" is thus without foundation in the language of the Act, or the legislative history.

Petitioner's attempted reading of the statute would subvert its policy. Those who consume in the course of trade or business include some of the largest and most influential purchasers. Common examples are the steel mill buying coal for consumption in its blast furnaces, the department store buying delivery trucks, or the railroad buying ballast for its right of way. (*Bowles* v. *Seminole Rock and Sand Co., supra*). Cf. also *Bowles* v. *Rock*, 55 F. Supp. 865 (D. Neb. 1944); *Bowles* v. *Silverman*, 57 F. Supp. 990 (D. S. Dak. 1944).

Petitioner makes no contention, other than the point just considered—which relates to all producers who use a purchased product in the course of business but do not resell it—that farming is not a "trade or business", and that a purchase of harvesting and threshing machinery for carrying on general farming operations is not for use "in the course of trade or business" within the meaning of Section 205 (e). Petitioner did present such an argument to the Circuit Court of Appeals, and the opinion below collects

the authorities which demonstrate that farming is properly to be regarded as a trade or business within the meaning of the Act (R. 32, n. 5).

2. Petitioner contends that because the Administrator is not suing for actual damages which he or the Government has suffered, the proceeding violates the provision of the Fifth Amendment that private property shall not be "taken for public use without just compensation".[5] The thought apparently is that the Constitution prohibits the Federal Government from imposing civil penalties payable to it in the absence of pecuniary injury to it.

But Congress has frequently availed itself of the civil penalty as a method of law enforcement, and this Court has held that there was no constitutional objection to its doing so. *Hepner* v. *United States*, 213 U. S. 103 (transporting an alien into the country unlawfully); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320 (same); *Chicago B. & Q. Ry. Co.* v. *United States*, 220 U. S. 559, 578 (Safety Appliance Act); *Baltimore & Ohio Southwestern R. R.* v. *United States*, 220 U. S. 94 (Care of Animals in Transit Act); *Helvering* v. *Mitchell*, 303 U. S. 391, 399–404, and cases cited therein.

[5] Petitioner's answer did not advert to the Fifth Amendment but to Article III, Section 2 and the Sixth Amendment as support for the constitutional contention (R. 10).

Thus the Administrator's right of recovery is entirely constitutional even if regarded as penal. *A fortiori*, there can be no constitutional objection to giving the Government a right of recovery for overcharges in lieu of those purchasers as to whom the granting of such a remedy was not deemed desirable.[6]

CONCLUSION

The decision of the court below is correct and is supported by the decision of the other appellate courts. Accordingly we respectfully submit that certiorari should be denied.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

THOMAS I. EMERSON,
Deputy Administrator for Enforcement,

FLEMING JAMES, JR.,

ABRAHAM GLASSER,

NATHAN SIEGEL,
Office of Price Administration.

APRIL, 1945.

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[6] In so far as petitioner is complaining of the liquidated damages in the amount of twice the overcharge, as distinct from the overcharge itself, the case is premature, inasmuch as the remand requires the district court to determine, under the test prescribed in the 1944 amendment to the Act (*supra*, p. 4), whether petitioner is liable for more than the amount of the overcharge.